DR. ROBERT D. ROSS, DR. LISA ROSS AND	NO. 22-C-24
THE HOLY LAND ON THE LAKE	FIFTH CIRCUIT
HOMEOWNER'S ASSOCIATION	COURT OF APPEAL
VERSUS	STATE OF LOUISIANA
FRANK J. D'AMICO, JR. AND JOHN DOE	

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS
Susan S. Buchholz
First Deputy, Clerk of Court

February 04, 2022

Susan Buchholz
First Deputy Clerk

IN RE FRANK J. D' AMICO, JR.

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE JUNE B. DARENSBURG, DIVISION "C", NUMBER 773-604

Panel composed of Judges Fredericka Homberg Wicker,
Jude G. Gravois, and Marc E. Johnson

WRIT DENIED; REQUEST FOR ORDER OF STAY DENIED AS MOOT

Defendant/relator, Frank J. D'Amico, Jr., seeks this Court's supervisory review of the trial court's December 14, 2021 judgment which denied his motion for partial summary judgment. Upon *de novo* review, for the following reasons, on the showing made, we find that genuine issues as to material fact remain at this time, and accordingly, Mr. D'Amico is not entitled to partial summary judgment at this time as a matter of law. Accordingly, this writ application is denied.

Mr. D'Amico also filed a Request for Order of Stay of the District Court Proceedings in this Court, pending the disposition of this writ application. We also deny the Request for Order of Stay of the District Court Proceedings filed by Mr. D'Amico in this Court as moot.

FACTS AND PROCEDURAL BACKGROUND

This suit concerns a dispute between two adjoining property owners in Metairie, Louisiana. In 2016, Mr. D'Amico allegedly cut down five holly trees that were located on or near the boundary of the subject properties.[1] Shortly thereafter, plaintiffs/respondents, Dr. Robert D. Ross and his wife, Dr. Lisa Ross,

[1] The degree to which the trees were cut appears to be disputed. Representations in the writ application suggest that the trees, which had been around 30 feet tall, were cut down to "the stumps" in 2016, and have since regrown to around 16 feet tall.

the neighboring property owners, sued Mr. D'Amico for damages, claiming ownership of the trees, and alleging that Mr. D'Amico committed a trespass upon their property and destroyed their property, the trees in question. In response, Mr. D'Amico filed a reconventional demand against the Rosses, claiming harassment. Apparently, only three of the trees originally at issue still remain at issue herein, as two of the trees appear to have been located in a utility right of way.

On October 9, 2019, Mr. D'Amico filed a Supplemental Motion for Partial Summary Judgment, claiming that no genuine issues as to material fact remained as to whether he was allowed to cut down the subject trees under La. C.C. arts. 687 and 688, and that under those laws, the facts regarding who owned the trees was totally irrelevant and therefore not a genuine issue as to material fact.[2] The Rosses opposed the Supplemental Motion for Partial Summary Judgment, and therein objected to particular documents (and attachments thereto) attached by Mr. D'Amico to the motion. The motion came on for a hearing on December 14, 2021. At the conclusion of the hearing, the trial court ruled from the bench, denying the Rosses' objections to the exhibits and denying the motion.

Because the trial court's written judgment cited "oral reasons" for ruling assigned at the hearing, this Court ordered Mr. D'Amico to supplement the writ application with the transcript of the hearing. Also, because the writ application evidenced that Mr. D'Amico had asked the trial court for written reasons for judgment, this Court ordered Mr. D'Amico to supplement the writ application with those written reasons, if such were issued. In due course, the writ application was duly supplemented. Mr. D'Amico also filed in this Court a supplemental memorandum in support of the writ application.

LAW AND ANALYSIS

"After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3). "The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law." La. C.C.P. art. 966(D)(1).

Our review of summary judgments is *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Pizani v. Progressive Ins. Co.*, 98-225 (La. App. 5 Cir. 9/16/98), 719 So.2d 1086, 1087. A *de novo* review is where the appellate court uses the trial court's record, but reviews the evidence and law without deference to the trial court's rulings. *Wooley v. Lucksinger*, 06-1140 (La. App. 1 Cir. 12/30/08), 14 So.3d 311, 335. The decision as to the propriety of a grant of a motion for summary judgment must be made with reference to the substantive law applicable

[2] Presumably, this Supplemental Motion for Partial Summary Judgment supplements an earlier-filed motion for summary judgment, which has not been included in this writ application.

to the case. *Young v. Hard Rock Constr., L.L.C.*, 19-484 (La. App. 5 Cir. 3/17/20), 292 So.3d 178, 184, *writ denied*, 20-00544 (La. 9/23/20), 301 So.3d 1190.

Pertinent to this matter, La. C.C. art. 687, entitled "Trees, bushes, and plants on the boundary," provides:

> Trees, bushes, and plants on the boundary are presumed to be common unless there be proof to the contrary.
>
> An adjoining owner has the right to demand the removal of trees, bushes, or plants on the boundary that interfere with the enjoyment of his estate, but he must bear the expense of removal.

Further, La. C.C. art. 688, entitled "Branches or roots of trees, bushes, or plants on neighboring property," provides:

> A landowner has the right to demand that the branches or roots of a neighbor's trees, bushes, or plants, that extend over or into his property be trimmed at the expense of the neighbor.
>
> A landowner does not have this right if the roots or branches do not interfere with the enjoyment of his property.

La. C.C. art. 687 establishes a presumption that a tree located on the boundary between two properties is common. *Jack v. Successions of Albert*, 18-1240 (La. App. 1 Cir. 9/4/19), 286 So.3d 432, 436-37, citing 4 A.N. Yiannopoulos & Ronald J. Scalise, Jr., *Louisiana Civil Law Treatise*: *Predial Servitudes*, § 4:23 at p. 270 (4th Ed. 2013). The presumption of common ownership may be overcome by proof to the contrary. *Id.* As in any matter in which there is a rebuttable presumption, the burden rests on the party challenging the presumption to convince the trier of fact that his proposed conclusion is more correct than the presumed one. *Id.*, citing *Jones v. LSU/EA Conway Medical Center*, 45,410 (La. App. 2 Cir. 8/11/10), 46 So.3d 205, 211. If there is no proof to the contrary and the presumption of commonness stands, an adjoining landowner may have a common tree removed from the property, but that adjoining landowner's remedy is to remove the tree at his own expense. *Jack v. Successions of Albert*, 286 So.3d at 437. Even if a tree situated on a boundary is not common, an adjoining landowner has the right to demand that the tree interfering with the enjoyment of his property be cut at his own expense. *Id.*, citing La. C.C. art. 687, 1997 Revision Comment (b).

Trees may be owned by a person other than the owner of the ground. The mere fact that a tree may have grown to extend onto a neighbor's property is not sufficient to transfer ownership or make ownership common. *Noya v. Versteeg*, 10-0946 (La. App. 4 Cir. 2/2/11), 2011 WL 9160349 (nonpublished opinion).

Under La. C.C. art. 688, which applies to non-commonly owned trees, a landowner has only a qualified right to demand that the owner/neighbor trim branches from the neighbor's trees extending over the landowner's property at the neighbor's expense; the right is limited to the extent that the branches interfere with the landowner's enjoyment of his property. *Scott v. Ramos*, 399 So.2d 1266 (La. App. 4th Cir. 1981), *writ denied*, 404 So.2d 279 (La. 1981).

"Interfer[ing] with the enjoyment" of his property, as used in both articles, appears to mean something different than the adjoining landowner's subjective dislike of the trees or bushes. *See Jack v. Successions of Albert*, *supra* (tree roots

under the neighbor's concrete driveway impaired its function); *Scott v. Ramos*, *supra* (neighbor's recurring expenses to remove tree debris from gutters, roof, and yard).

Mr. D'Amico's Supplemental Motion for Partial Summary Judgment, which is included in the writ application, asked that the trial court determine that the trees at issue were located either on or mostly on his side of the property line, according to a survey and an affidavit from the surveyor attached to the memorandum in support of the motion, and that accordingly, whether or not Mr. D'Amico or the Rosses owned the trees was totally irrelevant to Mr. D'Amico's right, under La. C.C. art. 687, to remove the trees. The motion also asked the court to determine that Mr. D'Amico had not trespassed on the Rosses' property to remove the trees. Finally, the motion prayed that the court render judgment in favor of Mr. D'Amico and dismiss the Rosses' petition for damages against Mr. D'Amico.

In its written reasons for judgment, the trial court found that the trees at issue are located "on both properties," and therefore "there is a genuine issue of material fact as to whether [Mr. D'Amico] had an unfettered right to remove the trees without making a proper demand for removal of the trees."

Upon *de novo* review of the writ application and the attachments thereto, the opposition to the writ application, the supplemental memorandum in support of the writ application, and the supplement to the writ application containing the transcript of the hearing on the motion and the trial court's written reasons for judgment, on the showing made, we find that genuine issues as to material fact remain at this time, including the actual ownership of the trees at issue, whether the trees at issue are actually on the boundary between the subject properties, and if so, whether the trees at issue interfere with Mr. D'Amico's enjoyment of his estate, and if so, the extent of such interference, whether Mr. D'Amico has made demand on the Rosses for removal of the trees at issue, and who should bear the expense of removal of the trees at issue, whether in whole or in part. *See* La. C.C. arts. 687 and 688. Accordingly, we find that Mr. D'Amico is not entitled to partial summary judgment at this time as a matter of law. *See* La. C.C.P. art. 966(A)(3). This writ application is accordingly denied.

We also deny the Request for Order of Stay of the District Court Proceedings filed by Mr. D'Amico in this Court as moot.

Gretna, Louisiana, this 4th day of February, 2022.

JGG
FHW
MEJ

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
HANS J. LILJEBERG
JOHN J. MOLAISON, JR.

JUDGES

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FIRST DEPUTY CLERK

MELISSA C. LEDET
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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **02/04/2022** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

22-C-24

E-NOTIFIED

24th Judicial District Court (Clerk)
Honorable June B. Darensburg (DISTRICT JUDGE)
Galen M. Hair (Respondent)
Charles R. Jones (Relator)
Michael A. Thomas (Relator)
David C. Spinner (Respondent)

MAILED